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Supreme Court of the United States

No. 72-855

ALLEGHENY AIRLINES, INC.,

Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM, and JAMES McGIRR KELLY, LOUIS J. SPARVERO, and ROBERT K. BLOOM, members of the Commission,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
THE INTEREST OF THE NARUC AS *AMICUS CURIAE*	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	17
I. THE UNITED STATES COURT OF APPEALS PROPERLY AFFIRMED, ON THE GROUNDS OF EQUITABLE ABSTENTION, THE DISTRICT COURT'S DISMISSAL OF ALLEGHENY'S SUIT TO ENJOIN THE PENNSYLVANIA PUC FROM REQUIRING ALLEGHENY TO OBTAIN THE PENNSYLVANIA PUC'S APPROVAL PRIOR TO DISCONTINUING DIRECT SERVICE OVER AN INTRASTATE ROUTE FOR WHICH ALLEGHENY HAD PREVIOUSLY OBTAINED FROM THE PUC A CERTIFICATE OF PUBLIC CONVENIENCE	17
II. THE FEDERAL AVIATION ACT OF 1958 DOES NOT PREVENT PENNSYLVANIA FROM ADMINISTERING A REASONABLE REGULATORY PROGRAM TO PROTECT THE PUBLIC INTEREST OF TRAVELERS USING INTRASTATE AIR TRANSPORTATION	35
CONCLUSION	53

Page

TABLE OF AUTHORITIES

Judicial Decisions:

Alabama Public Service Commission v. Southern Railway Company, 341 U.S. 341 (1951) 21

Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942) 49

A. F. of L. Metal Traders Dept. v. Watson, 327 U.S. 582 (1946) 27

Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563 (1939) 27

Atchison, Topeka, & Santa Fe Railway Company v. Railroad Commission of the State of California, 283 U.S. 380 (1931) 49

Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1954) 16, 51

Buck v. California, 343 U.S. 99 50

California v. Thompson, 313 U.S. 109 (1941) 14, 38

California v. Zook, 336 U.S. 725 (1949) 49

Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954) 28

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264 (1933) 27

	Page
Chemical Specialties Manufacturers Assoc., Inc. v. Lowery, 452 F.2d 431 (2d Cir. 1971)	28
Cities Service Gas Company v. Peerless Oil & Gas Company, 340 U.S. 179 (1950)	42, 49
City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co., 357 U.S. 77 (1958)	28
City of Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942)	27
Colorado Anti-Discrimination Com v. Continental Air Lines, Inc., 372 U.S. 714 (1963)	48
Di Giovanni v. Camden F. Ins. Asso., 296 U.S. 64 (1935)	27
Dickinson v. Stiles, 246 U.S. 631 (1918)	49
Endicott Johnson Corp. v. Perkins, 317 U.S. 501	26
FPC v. Arkansas Power & Light Co., 330 U.S. 802 (1947)	26
FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1 (1961)	15, 50
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	48
Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929)	27
Gilvary v. Cuyahoga Valley Railway Company, 292 U.S. 57 (1934)	49

Page

Grand Trunk Railway Company of Canada v. Michigan Railroad Commission, 231 U.S. 457 (1913) 27

Halter v. Nebraska, 205 U.S. 34 (1907) 50

Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963) 14, 44, 45

Henderson Water Company v. Corporation Commission of the State of North Carolina, 269 U.S. 278 (1925) 27

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 48, 49

Illinois Commerce Commission v. Thomson, 318 U.S. 675 (1943) 27

Kelly v. Washington, 302 U.S. 1 (1937) 49

Lake Carriers' Assn. v. MacMullen, 406 U.S. 498 (1972) 11, 28, 34

Lawrence v. St. Louis-San Francisco Railway Company, 274 U.S. 588 (1927) 27, 28

Macauley v. Waterman S. S. Corp., 327 U.S. 540 (1946) 26, 27

Machine Co. v. State Corp. Commission of Va., 236 U.S. 699 (1915) 27

Matthews v. Rodgers, 284 U.S. 521 (1932) 27

Maurer v. Hamilton, 309 U.S. 598 (1940) 49

Page

Mintz v. Baldwin,
289 U.S. 346 (1933) 49

Missouri P. R. Co. v. Norwood,
283 U.S. 249 (1931) 50

Morgans L. & T. R. & S. S. Co. v. Louisiana,
118 U.S. 455 (1886) 50

Natural Gas Pipeline Co. v. Slattery,
302 U.S. 300 (1937) 27

Northwest Airlines, Inc. v. Minnesota,
322 U.S. 292 (1944) 16, 51

Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana,
332 U.S. 507 (1947) 42

Pennsylvania Gas Co. v. Public Service Commission,
252 U.S. 23 (1920) 42

Pennsylvania v. Williams,
294 U.S. 176 (1935) 27

People v. Western Air Lines, Inc.,
42 Cal. 2d 261 (1954) 15, 51

Porter v. Investors Syndicate,
286 U.S. 461 (1931) 27

Public Service Commission of Utah v. Wycoff,
344 U.S. 237 (1952) 9, 10, 18, 19, 26

Public Utilities Commission of the State of California v. United Air Lines, Inc.,
346 U.S. 402 (1953) 8, 9, 11, 17, 18, 26, 28

Public Utilities Commission v. Gas Co.,
317 U.S. 456 (1943) 28

Page

Railroad Commission of Texas v. Pullman Co.,
312 U.S. 496 (1941) 27

Rochester Tel. Corp. v. United States,
307 U.S. 125 (1939) 27

Savage v. Jones,
225 U.S. 501 (1912) 49

Schwartz v. Texas,
344 U.S. 199 (1952) 49

Shipman v. Du Pre,
339 U.S. 321 (1950) 27

Sinnot v. Davenport,
22 How (U.S.) 227 (1859) 49

Southern Pacific Company v. Arizona,
325 U.S. 761 (1945) 49

Spector Motor Service v. McLaughlin,
323 U.S. 101 (1944) 27

Re Squires,
114 Vt. 285, 44 A2d 133 49

St. Louis-San Francisco Railway Company v. Alabama Public Service Commission,
279 U.S. 560 (1929) 27

Texas Aeronautics Commission v. Braniff Airways, Inc., 454 SW 2d 199, cert. den., 27 L. Ed. 2d 247, 91 S. Ct. 244 (1970) 52

Thompson v Magnolia Petroleum Co.,
309 U.S. 478 (1940) 27

United Air Lines, Inc. v. Public Utilities Commission of the State of California,
342 U.S. 908 (1952) 51

Page

Watson v. Buck,
313 U.S. 387 (1941) 27

H. P. Welch Co. v. New Hampshire,
306 U.S. 79 (1939) 49

Statutes:

Civil Aeronautics Act of 1938 . . . . . 15, 17, 51

Communications Act, 47 U.S.C.,
Sec. 151, *et seq.* 37, 45

Federal Aviation Act of 1958, 49 U.S.C., 13, 14, 15,
Sec. 1301, *et seq.* 16, 35, 36, 37, 51

Federal Motor Carrier Act 38

Federal Power Act, 16 U.S.C.,
Sec. 791, *et seq.* 36

Federal Railroad Safety Act of 1970. 37

Interstate Commerce Act,
49 U.S.C., Sec. 1, *et seq.* 36, 37

Natural Gas Act, 15 U.S.C.,
Sec. 791, *et seq.* 36, 42

Natural Gas Pipeline Safety Act of 1968,
49 U.S.C., Secs. 1672-1674 36

Pennsylvania Public Utility Law 10, 28, 33

Miscellaneous:

78th Congress, S. 246, H.R. 1012, H.R. 3420,
H.R. 4845, H.R. 4848 37

79th Congress, S. 541, H.R. 674, H.R. 3383 37

80th Congress, H.R. 2337 37

81st Congress, S. 423, S. 445, S. 2435 37

1944-1950 NARUC Annual Convention Proceedings . . 37

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits, as provided by Rule 42 of the Rules of this Court, the following brief *amicus curiae* in this case in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by Allegheny Airlines, Inc. (Allegheny).

Counsel for Allegheny, Petitioner, and counsel for the Pennsylvania Public Utility Commission (Pennsylvania PUC) and its members, Respondents, have consented to the NARUC's filing this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 465 F.2d 237 and reprinted in Appendix A, pp. 13a-28a of the Petition for Writ of Certiorari. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 319 F. Supp. 407 and is reprinted in Appendix A. pp. 1a-12a of the Petition.

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals Properly Affirmed, on the Grounds of Equitable Abstention, the District Court's Dismissal of Allegheny's Suit to Enjoin the Pennsylvania PUC from Requiring Allegheny to Obtain the Pennylvania PUC's Approval Prior to Discontinuing Direct Service Over an Intrastate Route for which Allegheny had Previously Sought and Obtained from the PUC a Certificate of Public Convenience?

II. Whether the Federal Aviation Act of 1958 Prevents Pennsylvania from Administering a Reasonable Regulatory Program to Protect the Public Interest of Travelers Using Intrastate Air Transportation?

THE INTEREST OF THE NARUC AS *AMICUS CURIAE*

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials, including the Commissioners of the Pennsylvania PUC, Respondents herein, charged with the duty of regulating air transportation within their respective States and, as such, they have the obligation to assure the establishment and maintenance of such air transportation and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates and charges that are just and reasonable.

The NARUC has actively participated in the court of appeals and district court below as an *amicus curiae*, submitting *amicus curiae* briefs with the court of appeals on April 12, 1971 and September 6, 1972, and with the district court on June 20, 1972.

STATEMENT OF THE CASE

Allegheny seeks review of the dismissal of its suit to enjoin the Respondents, the Pennsylvania PUC and its members, from enforcing Pennsylvania law which requires Allegheny to either: provide direct service over an intrastate route between Harrisburg and Williamsport, pursuant to the PUC certificate held by Allegheny; or seek the approval of the PUC to discontinue such service. Allegheny also seeks to avoid having to obtain PUC approval for any

other intrastate service changes it may desire to make, irrespective of what public interest considerations may be involved.

Allegheny is the largest local service airline carrier in the Nation (319 F. Supp. at 409, Allegheny's Petition, App., p. 2a; Stip. 2). Its present route structure covers seventeen States, the District of Columbia and Canada. *Id.* The area served is roughly defined by St. Louis/Chicago on the West, Toronto on the North, Boston on the East, and Memphis/Norfolk on the South. More than 50% of the Nation's population is contained in this area (Stip. 4).

Of the seventeen States served by Allegheny, it only provides intrastate service in the following nine: Connecticut, Indiana, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and West Virginia (319 F. Supp. at 409, Allegheny's Petition, App., p. 2a; Stip. 10).

Pursuant to an application by Allegheny, the Pennsylvania PUC first certificated it on August 19, 1941, to transport *property* by air in intrastate commerce within Pennsylvania (319 F. Supp. at 409, Allegheny's Petition, App., p. 2a; Stip. 11). On January 11, 1949, Allegheny received a certificate from Civil Aeronautics Board (CAB) to provide interstate passenger service over a route structure, designated as "Route 97," covering the District of Columbia and seven States, including Pennsylvania (*Id.*; Stip. 1). On March 21, 1949, the Pennsylvania PUC approved Allegheny's application to transport *persons* and property by air in intrastate commerce within the State (*Id.*; Stip. 11).

In the years since 1949, or more explicitly from January 29, 1951 to November 24, 1969, the Pennsylvania PUC has issued thirteen orders which have granted *every* application of Allegheny to abandon, suspend, substitute or extend

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ervice (Stip. 12-14). The Stipulation entered into by the arties does not reveal *one instance* where the Pennsylvania PUC has denied an application of Allegheny.

The Pennsylvania PUC in a certificate issued on Septemer 11, 1967, redefined Allegheny's authority to provide ervice over several routes, number (5) of which provides or service "Between Erie and Harrisburg via Bradford and Williamsport" (Complaint, Exh. A).

The Pennsylvania PUC on June 10, 1968, issued a rule o show cause, reciting that it had received information inlicating that Allegheny had abandoned direct service beween Harrisburg and Williamsport without PUC approval, nd ordering Allegheny to show cause why its certificate hould not be cancelled or other penalties imposed for bandonment of such service contrary to Pennsylvania law 465 F.2d at 239, Allegheny's Petition, App., p. 15a; Comlaint, Exh. A).

Allegheny on August 1, 1968, responded to the rule to how cause by answering: that direct, single-plane service etween every city pair on a linear route served by a cerificated air carrier is not required by the CAB and hence hould not be required by the PUC; that such a requirenent would "create a serious economic drain" on Allegheny nd thereby "constitute an impermissible burden on interate commerce"; that Allegheny meets its basic certificate bligation, both Federal and State, by providing service beween Harrisburg and Williamsport via on-line connections t Pittsburgh or Wilkes-Barre/Scranton; and that therefore llegheny had not abandoned its Harrisburg-Williamsport oute. Allegheny requested the PUC to vacate the rule to how cause and to terminate the proceeding (*Id.*; Complaint, xh. B).

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The Pennsylvania PUC on September 19, 1968, held a hearing on its rule to show cause and Allegheny's answer. In this hearing, Allegheny chose to offer *no* testimony and *no* exhibits, but relied on statements for the record by its counsel (*Id.*; Complaint, Exh. C, pp. 3, 5).

The Pennsylvania PUC on June 23, 1969, issued an order imposing on Allegheny a penalty of $5,000 for failure to seek Pennsylvania PUC approval for the abandonment of direct service between Harrisburg and Williamsport, and directing Allegheny to reinstitute such service or in lieu thereof to file with the PUC a *nunc pro tunc* application to abandon such service (465 F.2d at 239, Allegheny's Petition, App., p. 16a; 319 F. Supp. at 410, Allegheny's Petition, App., p. 4a; Complaint, Exh. C, p. 11).

Meanwhile, the Pennsylvania PUC on May 26, 1969, issued another rule to show cause reciting that Allegheny had abandoned certain other intrastate service and instituted new intrastate service within Pennsylvania without the approval of the PUC. Accordingly, the PUC ordered Allegheny to show cause why its certificate should not be cancelled or other penalties imposed for the abandonment and institution of services contrary to Pennsylvania law.

In September, 1969, Allegheny filed its complaint instituting Civil Action No. 69-2148 in the United States District Court for the Eastern District of Pennsylvania; to void the PUC's orders and rules to show cause, which are placed in issue by the complaint, on the grounds that they have been preempted by CAB regulation under the Federal Aviation Act of 1958 and that they create an undue burden on interstate commerce; and to enjoin the PUC from seeking to regulate Allegheny's intrastate service in the manner challenged in the complaint.

Allegheny made no effort to establish a factual record before the PUC or to seek relief in State court or even to exhaust its remedy before the Pennsylvania PUC with respect to the order of May 26, 1969 (465 F.2d at 239, Allegheny's Petition, App., p. 15a; 319 F. Supp. at 410, Allegheny's Petition, App., p. 4a).

The Pennsylvania PUC answered the complaint and, thereafter, it and Allegheny signed a stipulation of facts and each moved for summary judgment and filed supporting briefs.

The CAB filed an *amicus curiae* brief supporting the issuance of an injunction against the PUC. However, it carefully avoided taking a "position with respect to procedural issues or questions of judicial jurisdiction." (CAB Brief, p. 6).

The NARUC filed an *amicus curiae* brief supporting the position of the Pennsylvania PUC.

Following oral argument, the District Court entered an Order on November 10, 1970, dismissing the complaint primarily on the ground that Allegheny had not attempted to exhaust adequate State remedies (319 F. Supp. 407, Allegheny's Petition, App., p. 1a).

On July 21, 1972, the United States Court of Appeals for the Third Circuit, in an opinion written by Judge Rosenn, affirmed the Federal District Court's refusal to exercise jurisdiction in this case on the grounds of equitable abstention (465 F.2d 237, Allegheny's Petition, App., p. 13a).

In a Petition for Rehearing In Banc filed on August 4, 1972, Allegheny challenged the Court's application of the abstention doctrine in the instant case. The Petition for Rehearing In Banc was denied on September 13, 1972,

in an 8 to 1 decision with Judge Gibbons dissenting (Allegheny's Petition, App., p. 31a).

SUMMARY OF ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS PROPERLY AFFIRMED, ON THE GROUNDS OF EQUITABLE ABSTENTION, THE DISTRICT COURT'S DISMISSAL OF ALLEGHENY'S SUIT TO ENJOIN THE PENNSYLVANIA PUC FROM REQUIRING ALLEGHENY TO OBTAIN THE PENNSYLVANIA PUC'S APPROVAL PRIOR TO DISCONTINUING DIRECT SERVICE OVER AN INTRASTATE ROUTE FOR WHICH ALLEGHENY HAD PREVIOUSLY OBTAINED FROM THE PUC A CERTIFICATE OF PUBLIC CONVENIENCE.

In cases of this nature, there exists a well established principle of our Federal-State system of government which requires the exhaustion of State administrative and judicial processes prior to the exercise of jurisdiction by the Federal courts.

One of the leading cases is *Public Utilities Commission of the State of California v. United Air Lines, Inc.*, 346 U.S. 402, 98 L. Ed. 140, 74 S. Ct. 151 (1953), which involved the issue of whether the California PUC or the CAB has jurisdiction over the rates which United charges for transportation between California mainland points and Catalina Island. Since Catalina Island is part of California, the PUC claimed jurisdiction.

The then Civil Aeronautics Act gave the CAB authority over rates "between places in the same State of the United States through air space over any place outside thereof." United and the CAB both claimed that flights from the

mainland to Catalina (a distance of 30 miles) are over the "high seas" and therefore under the exclusive jurisdiction of the CAB.

A three judge Federal district court upheld the contentions of United and the CAB. 109 F. Supp. 13.

On appeal, this Court in a *per curiam* order "reversed on authority of *Public Service Commission v. Wycoff,*" 344 U.S. 237, 97 L. Ed. 291, 73 S. Ct. 236 (1952). The Supreme Court in effect held that neither declaratory nor injunctive relief should be granted to an air carrier in an action seeking to prevent, on the ground that the CAB has exclusive jurisdiction, a State PUC from exercising its claimed jurisdiction over rates charged by the carrier for transportation between points in the same State but over the high seas.

The *California PUC* case presents the strongest possible application of the exhaustion doctrine since it presented for decision a clear cut legal issue unencumbered by any unresolved question of fact. In contrast, the case *sub judice* should ultimately turn on a factual record being developed as to whether it is reasonable to require direct air service between Harrisburg and Williamsport.

In the *Wycoff* case, which is the one the Supreme Court placed sole reliance on in the *California PUC* case, a motor carrier sought in a Federal district court a declaratory judgment that its transportation of motion picture film and newsreels between points in Utah constituted an integral part of interstate commerce, and an injunction against the Utah Public Service Commission to prevent interference with such transportation over routes authorized by the Interstate Commerce Commission. The district court upheld the Utah Commission and the court of appeals reversed.

On appeal, this Court reversed on the basis that federal courts should not interfere with proceedings before State administrative agencies.

Pennsylvania law provides adequate remedies. The Pennsylvania PUC is empowered to adopt regulations and orders and "to rescind or modify any such regulations or orders." Public Utility Law, Sec. 902. See also Sec. 1007.

Accordingly, Allegheny may apply to the Pennsylvania PUC to have the penalty rescinded and its certificate amended to reflect only economically viable operations.

Judicial review of PUC orders is provided by Article XI of the Public Utility Law. The granting of supersedeas is authorized pending review. Sec. 1103.

The delay and expense, which will occur to Allegheny in the exhaustion of its well-defined State remedies, are of its own making. It *chose* to ignore these remedies in the face of a long line of cases applying the doctrine of abstention in Federal-State relations.

Moreover, the doctrine of abstention is more than a theoretical exercise in promoting comity between the Federal and State governments. It has a growing practical application today in conserving the time and energy of the Federal judiciary in its efforts to handle a rapidly growing case load. Why should the over-burdened Federal courts be called upon to expend valuable time in deciding a case of this nature which may easily be resolved by the PUC or the State courts?

Allegheny's Petition for a Writ of Certiorari, in substance, contends that the abstention doctrine does not apply to a case involving a Federal preemption question.

The distinction Allegheny attempts to draw in applying the abstention doctrine between a Federal preemption question and other Federal constitutional questions is a distinction without difference. The Federal preemption question involves construction of a Federal statute whereas a Federal constitutional question involves construction of a Federal constitutional provision. Both involve alleged conflicts with State statutes.

In addition, Allegheny ignores the most recent United States Supreme Court case applying the abstention doctrine. In *Lake Carriers' Assn. v. MacMullen,* 406 U.S. 498, 32 L. Ed. 2d 257, 40 U.S. Law Week 4569 (May 30, 1972), the United States Supreme Court held that abstention was proper in a case challenging the validity of the Michigan Watercraft Pollution Control Act. *Lake Carriers' Assn. v. MacMullen, supra,* 32 L. Ed. 2d at 264, 40 U.S. Law Week at 4571 (May 30, 1972) did involve a claim ". . . that the Michigan statute conflicts with or is pre-empted by federal law, primarily the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, and is therefore invalid under the Supremacy Clause."

Allegheny also ignores the case of *Public Utilities Commission of the State of California v. United Air Lines, Inc., supra.* This case also clearly involved a preemption claim. The case is extensively discussed in this brief, *supra.*

The cases relied upon by Allegheny in its Petition for a Writ of Certiorari did all hold "no abstention" in a given fact situation, but the instant case is distinguishable from these cases. The factors relied upon by Judge Rosenn were not present in those cases.

One of the principal factors relied upon by Judge Rosenn was the fact that Allegheny had on its own initiative sought

and obtained from the Pennsylvania PUC ". . . a certificate of public convenience as an *intrastate* carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport." (465 F.2d at 243, Allegheny's Petition, App., p. 24a.)

Clearly, a case such as the instant case, where the airline has sought and obtained a certificate of public convenience is distinguishable from cases where no such certificate was sought and obtained.

Additional factors relied upon by Judge Rosenn as requiring abstention were:

(1) The State's interests in local airline service are significant. Airports, runways, and related facilities often require large expenditures at considerable community sacrifice and effort. In addition, the communities involved may have come to depend on the direct air service, and there is a presumption under Pennsylvania law that certificated public utility service is needed and vital, until a public utility proves otherwise (465 F.2d at 244, Allegheny's Petition, App., p. 25a).

(2) Allegheny presented no evidence suggesting that it would have been harmed by having to resort to the Pennsylvania PUC or State courts before discontinuing the service (*Id.*).

(3) Reliance by local communities upon the services provided by Allegheny would be reasonable in light of the airline's action in obtaining from the Pennsylvania PUC a certificate to transport persons and property between points in Pennsylvania (465 F.2d at 244, 245, Allegheny's Petition, App., p. 26a).

(4) The danger of Federal-State friction is intensified by Allegheny's request for a perpetual injunction which would enjoin the Pennsylvania PUC from "*any action or proceeding* for any violation of the laws of . . . Pennsylvania based upon action by Allegheny in changing its patterns of service." If this relief were granted, the airline, while not being subject to State regulation, would maintain the benefits that accrue to holders of State public utility certificates (465 F.2d at 245, Allegheny's Petition, App., p. 27a).

(5) There are no ". . . significant federal concerns which would override the other factors mentioned above. Even if it should be ultimately determined that the state does not have power to regulate the actions which precipitated this suit, a temporary co-existence of federal-state regulation will not frustrate any immediate goals or policies of the Federal Aviation Act." (465 F.2d at 245, Allegheny's Petition, App., p. 28a.)

In addition to the factors relied upon by this Court there is another factor supporting equitable abstention. This factor is that the State law is unsettled in this case, and a determination by State courts may make a determination on the Federal preemption issue unnecessary.

II.

THE FEDERAL AVIATION ACT OF 1958 DOES NOT PREVENT PENNSYLVANIA FROM ADMINISTERING A REASONABLE REGULATORY PROGRAM TO PROTECT THE PUBLIC INTEREST OF TRAVELERS USING INTRASTATE AIR TRANSPORTATION.

Congress, in enacting the Federal Aviation Act of 1958, clearly did not intend to completely preempt the regulation

of air transportation. CAB domestic jurisdiction in the economic sense is primarily couched in terms of "interstate air commerce" and "interstate air transportation."

Obviously, this is not the language of total Federal preemption.

The Congressional propensity to divide the interstate and intrastate characteristics of a national industry, and to assign the former to Federal regulation and to reserve the latter for State regulation, is consistently reflected in the programs governing electric, gas, motor carrier, railroad and telephone companies.

The Federal Aviation Act is the latest offspring in this family of legislation and bears unmistakably the genetic qualities of Federal-State regulatory alliance.

We believe Congress was wise in permitting the formation of this Federal-State alliance because its proper functioning affords the American people the maximum benefits from air transportation. Obviously, a State agency, such as the Pennsylvania PUC, is far more concerned with the adequacy of air transportation among the smaller communities in the State than is the CAB. In contrast, the CAB is far more concerned with the adequacy of a national air transportation system than is any single State. In short, the two regulatory interests form a partnership, complementing each other in advancing the public welfare.

Out of interpretations of the above Federal statutes, and out of other incidents of our Federalism, has evolved a line of decisions defining the interface between Federal and State jurisdiction. *California v. Thompson*, 313 U.S. 109, 85 L. Ed. 1219 (1941); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963).

The test of whether both Federal and State regulations may operate or the State regulation must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives. Federal regulation of a field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all State regulation at the other end.

When a dispute arises over whether a given transaction is within the scope of Federal or State regulatory authority, the problem should not be approached negatively, thus raising the possibility that a "no man's land" will be created. *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19, 5 L. Ed. 2d 377, 390, 81 S. Ct. 435 (1961).

In *People v. Western Air Lines, Inc.*, 42 Cal. 2d 261, 268 P. 2d 723 (1954), the court upheld the authority of the California Public Utilities Commission to regulate passenger rates for air coach service between Los Angeles and San Francisco. The court in construing the Civil Aeronautics Act of 1938, which is comparable to the Federal Aviation Act of 1958, held that "it seems clear that Congress has not sought to extend the economic regulation of the board (CAB) to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates." 268 P. 2d 736 (26). An appeal from this decision was dismissed by the United States Supreme Court "for want of a substantial Federal question." 348 U.S. 859, 99 L. Ed. 677, 75 S. Ct. 87 (1954).

The Supreme Court has also upheld the power of the States to tax the instrumentalities of airlines used in interstate commerce. *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 98 L. Ed. 967, 74 S. Ct. 757 (1954); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 88 L. Ed. 1283, 64 S. Ct. 950, 153 ALR 245 (1944).

As the Nation grows in population, the role of the State commissions in protecting the public interest in the local aspects of air transportation grows in importance. Obviously, the State is far more concerned than the CAB in seeing that local communities receive adequate intrastate air transportation to the extent economically feasible.

We readily admit national supremacy in air transportation and that the State role must not interfere with the accomplishment of national objectives as determined by the Federal Aviation Act.

We admit that the final determination of public need for air service must ultimately rest in its use by the traveling public.

We admit that an airline should be authorized to eliminate certain cities as intermediate points on a route where the cost of serving such points would be too great in relation to the small volume of traffic.

We merely contend that State commissions should continue to be entrusted with the making of initial decisions regarding matters of intrastate air transportation. The nature of Allegheny's Federal certificate in this case, which permits great freedom in abandoning routes within Pennsylvania, indicates that the CAB is only secondarily interested in intrastate service. This is understandable when we consider its immense duties involving interstate service.

If State regulation is ousted, public protection will be diminished. In the absence of Pennsylvania PUC regulation, Allegheny could easily decide to concentrate its equipment in serving the most remunerative segments and abandon other segments showing a lower margin of profit.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS PROPERLY AFFIRMED, ON THE GROUNDS OF EQUITABLE ABSTENTION, THE DISTRICT COURT'S DISMISSAL OF ALLEGHENY'S SUIT TO ENJOIN THE PENNSYLVANIA PUC FROM REQUIRING ALLEGHENY TO OBTAIN THE PENNSYLVANIA PUC'S APPROVAL PRIOR TO DISCONTINUING DIRECT SERVICE OVER AN INTRASTATE ROUTE FOR WHICH ALLEGHENY HAD PREVIOUSLY OBTAINED FROM THE PUC A CERTIFICATE OF PUBLIC CONVENIENCE.

In cases of this nature, there exists a well established principle of our Federal-State system of government which requires the exhaustion of State administrative and judicial processes prior to the exercise of jurisdiction by the Federal courts.

One of the leading cases is *Public Utilities Commission of the State of California v. United Air Lines, Inc.*, 346 U.S. 402, 98 L. Ed. 140, 74 S. Ct. 151 (1953), which involved the issue of whether the California PUC or the CAB has jurisdiction over the rates which United charges for transportation between California mainland points and Catalina Island. Since Catalina Island is part of California, the PUC claimed jurisdiction.

The then Civil Aeronautics Act, 52 Stat. 973, gave the CAB authority over rates "between places in the same

State of the United States through air space over any place outside thereof." United and the CAB both claimed that flights from the mainland to Catalina (a distance of 30 miles) are over the "high seas" and therefore under the exclusive jurisdiction of the CAB.

A three judge Federal district court upheld the contentions of United and the CAB. 109 F. Supp. 13.

On appeal, this Court in a *per curiam* order "reversed on authority of *Public Service Commission v. Wycoff*," 344 U.S. 237, 97 L. Ed. 291, 73 S. Ct. 236 (1952). The Supreme Court in effect held that neither declaratory nor injunctive relief should be granted to an air carrier in an action seeking to prevent, on the ground that the CAB has exclusive jurisdiction, a State PUC from exercising its claimed jurisdiction over rates charged by the carrier for transportation between points in the same State but over the high seas.

The California PUC case presents the strongest possible authority for application of the exhaustion doctrine since it presented for decision a clear cut legal issue unencumbered by any unresolved question of fact. In contrast, the case *sub judice* should ultimately turn on a factual record being developed as to whether it is reasonable to require direct air service between Harrisburg and Williamsport.

In the *Wycoff* case, which is the one this Court placed sole reliance on in the *California PUC* case, a motor carrier sought in a Federal district court a declaratory judgment that its transportation of motion picture film and newsreels between points in Utah constituted an integral part of interstate commerce, and an injunction against the Utah Public Service Commission to prevent interference with such transportation over routes authorized by the

Interstate Commerce Commission. The district court upheld the Utah Commission, the court of appeals reversed, and this Court granted certiorari.

In its opinion, this Court quickly decided the inappropriateness of injunctive relief and devoted the remainder of its opinion in reaching the same conclusion as to declaratory relief. The Court stated in part that [344 U.S. 246, 97 L. Ed. 297 (11)]:

> Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Eccles v. Peoples Bank*, 333 U.S. 426, 92 L. Ed. 784, 68 S. Ct. 641. See *Colegrove v. Green*, 328 U.S. 549, 90 L. Ed. 1432, 66 S. Ct. 1198. Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.
>
> But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it

is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

> The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341, 95 L. Ed. 1002, 71 S. Ct. 762 (1951), the railroad was denied authority by the Alabama PSC to discontinue passenger train service on the ground that there was a public need for the service although it was being operated at a loss. Alleging that irreparable loss would result from the continued operation of the service, the railroad sought and obtained an injunction from a three-judge Federal district court against the enforcement of Alabama law.

On appeal, this Court held that, although there was a basis for Federal jurisdiction, the exercise of such jurisdiction should, on considerations of comity, be withheld on the ground that the State law provided for review of the PSC's order in the State courts and for stay pending such review. This Court reasoned that [341 U.S. 345, 95 L. Ed. 1006(3)]:

> Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission. 49 U.S.C., Secs. 1, *et seq.* But, it has long been held that this interblending of the interstate and intrastate operations

does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U.S. 352, 57 L. Ed. 1511, 33 S. Ct. 729, 48 LRA NS 1151, Ann Cas 1916A 18 (1913). And Congress has since provided:

"That nothing in (the Interstate Commerce Act) shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the (Interstate Commerce Commission)." 49 U.S.C., Sec. 1(17)(a).

This Court has held that regulation of intrastate railroad service is "primarily the concern of the state." *North Carolina v. United States*, 325 U.S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer v. Massachusetts*, 308 U.S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service).

State and federal regulatory agencies have expressed concern over the chronic deficit arising out of passenger train operations as a threat to the financial security of the American railroads and have recommended drastic action to minimize the deficit including the discontinuance of unpatronized and unprofitable service. However, our concern in this case is limited to the propriety of a federal court injunction enjoining enforcement of a state regulatory order.

The court below justified the exercise of its jurisdiction with a finding that continued operation of trains Nos. 7 and 8 would result in confiscation of appellee's property in violation of the Due Process Clause of the Fourteenth Amendment. In pursuing the threshold inquiry whether a federal court should exercise jurisdiction in this case, we find it unnecessary to consider issues relating to the merits of appellee's case, issues which appellants did not see fit to raise in this Court either in their Statement of Jurisdiction or in their briefs. We do note that in passing upon similar contentions in the past, this Court has recognized that review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved when the return on the entire intrastate operations of a utility is drawn into question. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U.S. 1, 24-27, 51 L. Ed. 933, 944, 945, 27 S. Ct. 585, 11 Ann Cas 398 (1907). The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered. *Chesapeake & Ohio R. Co. v. Public Service Comm. of West Virginia*, 242 U.S. 603, 608, 61 L. Ed. 520, 523, 37 S. Ct. 234 (1917).

The Alabama Commission, after a hearing held in the area served, found a public need for the service. The court below, hearing evidence *de novo*, found that no public necessity exists in

view of the increased use and availability of motor transportation. We do not attempt to resolve these inconsistent findings of fact. We take note, however, of the fact that a federal court has been asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the public need for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and other Alabama communities directly affected.

Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, tit. 48, Sec. 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, *id.* Sec. 82, and its decision may be appealed to the Alabama Supreme Court. *Id.*, Sec. 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are "supervisory in character." *Avery Freight Lines, Inc. v. White*, 245 Ala. 618, 622, 623, 18 So2d 394, 398, 154 ALR 732 (1944). The Supreme Court of Alabama has held that it will review an order of the Commission as if appealed directly to it, *Alabama Public Service Com. v. Nunis*, 252 Ala. 30, 34, 39 So2d 409, 412 (1949), and that

judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted. *Alabama Public Service Com. v. Southern Bell Tel. & Tel. Co.*, 253 Ala. 1, 11, 12, 42 So2d 655, 662 (1949). . . . Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code, 1940, tit. 48, Secs. 81, 84. Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts." Considering that "(f)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with State policies," the usual rule of comity must govern the exercise of equitable jurisdiction by the

District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 577, 85 L. Ed. 358, 362, 61 S. Ct. 343 (1941); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021, as amended, 311 U.S. 614, 615, 85 L. Ed. 390, 391, 61 S. Ct. 66 (1940). . . .

As this Court held in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297, 298, 87 L. Ed. 1407, 1410, 1411, 63 S. Ct. 1070 (1943):

"This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer. . . .

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

The rationale of the *California PUC*, *Wycoff* and *Alabama PSC* cases is also reflected in: *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U.S. 802, 91 L. Ed. 1261, 67 S. Ct. 963; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 87 L. Ed. 424, 63 S. Ct. 339; *Macauley v. Waterman S. S. Corp.*, 327 U.S. 540, 90 L.

Ed. 839, 66 S. Ct. 712; *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 83 L. Ed. 1147, 59 S. Ct. 754; *Matthews v. Rodgers,* 284 U.S. 521, 525, 76 L. Ed. 447, 451, 52 S. Ct. 217 (1932); *Pennsylvania v. Williams,* 294 U.S. 176, 185, 79 L. Ed. 841, 847, 55 S. Ct. 380, 96 ALR 1166 (1935); *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 500, 85 L. Ed. 971, 974, 61 S. Ct. 643 (1941); *Natural Gas Pipeline Co. v. Slattery,* 302 U.S. 300, 82 L. Ed. 276, 281 (4, 5), 58 S. Ct. 199 (1937); *Atlas Life Ins. Co. v. W. I. Southern, Inc.,* 306 U.S. 563, 83 L. Ed. 987, 59 S. Ct. 657; *Shipman v. Du Pre,* 339 U.S. 321, 94 L. Ed. 877, 70 S. Ct. 640; *Watson v. Buck,* 313 U.S. 387, 85 L. Ed. 1416, 61 S. Ct. 962, 136 ALR 1426 (1941); *Chicago v. Fieldcrest Dairies,* 316 U.S. 168, 86 L. Ed. 1355, 62 S. Ct. 986; *A.F. of L. Metal Trades Dept. v. Watson,* 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761; *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 89 L. Ed. 101, 65 S. Ct. 152; *Illinois Commerce Commission v. Thomson,* 318 U.S. 675, 686, 87 L. Ed. 1075, 1082(5) (1943); *Gilchrist v. Interborough Rapid Transit Co.,* 279 U.S. 159, 208, 209, 73 L. Ed. 652, 664, 665, 49 S. Ct. 282 (1929); *Porter v. Investors Syndicate,* 286 U.S. 461, 76 L. Ed. 1226, 52 S. Ct. 617, 287 U.S. 346, 77 L. Ed. 354, 53 S. Ct. 132 (1931); *Central Kentucky Natural Gas Co. v. Railroad Commission,* 290 U.S. 264, 271, 78 L. Ed. 307, 312, 54 S. Ct. 154; *Di Giovanni v. Camden F. Ins. Asso.,* 296 U.S. 64, 80 L. Ed. 47, 56 S. Ct. 1; *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 84 L. Ed. 876, 60 S. Ct. 628; *Henderson Water Company v. Corporation Commission of the State of North Carolina,* 269 U.S. 278, 70 L. Ed. 273, 46 S. Ct. 112 (1925); *St. Louis-San Francisco Railway Company v. Alabama Public Service Commission,* 279 U.S. 560, 73 L. Ed. 843, 49 S. Ct. 383 (1929); *Lawrence v. St. Louis-San*

Francisco Railway Company, 274 U.S. 588, 71 L. Ed. 1219 (1927); *Machine Company v. State Corporation Commission of Virginia*, 236 U.S. 699, 59 L. Ed. 797 (1915); *Grand Trunk Railway Company of Canada v. Michigan Railroad Commission*, 231 U.S. 457, 58 L. Ed. 310, 34 S. Ct. 152 (1913).

Pennsylvania law provides adequate remedies.

The Pennsylvania PUC is empowered to adopt regulations and orders and "to rescind or modify any such regulations or orders." Public Utility Law, Sec. 902. See also Sec. 1007.

Accordingly, Allegheny may seek to have the penalty rescinded and its certificate amended to reflect only economically viable operations by applying to the Pennsylvania PUC.

Judicial review of PUC orders is provided by Article XI of the Public Utility Law. The granting of supersedeas is authorized pending review. Sec. 1103.

The delay and expense, which will occur to Allegheny in the exhaustion of its well-defined State remedies, are of its own making. It *chose* to ignore these remedies in the face of a long line of cases applying the doctrine of abstention in Federal-State relations.

Allegheny stands here in the awkward posture of the proverbial child who, having murdered his mother and father, begs the court for mercy on the ground that he is an orphan.

Allegheny's Petition for a Writ of Certiorari, in substance, contends that the abstention doctrine does not apply to a case involving a Federal preemption question.

The distinction Allegheny attempts to draw in applying the abstention doctrine between a Federal preemption question and other Federal constitutional questions is a distinction without a difference. The Federal preemption question involves construction of a Federal statute whereas a Federal constitutional question involves construction of a Federal constitutional provision. Both involve alleged conflicts with State statutes.

In addition, Allegheny ignores the most recent United States Supreme Court case applying the abstention doctrine. In *Lake Carriers' Assn. v. MacMullen,* 406 U.S. 498, 32 L. Ed. 2d 257, 40 U.S. Law Week 4569 (May 30, 1972), the United States Supreme Court held that abstention was proper in a case challenging the validity of the Michigan Watercraft Pollution Control Act. *Lake Carriers' Assn. v. MacMullen, supra,* 32 L. Ed. 2d at 264, 40 U.S. Law Week at 4571 (May 30, 1972) did involve a claim"... that the Michigan statute conflicts with or is pre-empted by federal law, primarily the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, and is therefore invalid under the Supremacy Clause."

Allegheny also ignores the case of *Public Utilities Commission of the State of California v. United Air Lines, Inc., supra.* This case also clearly involved a preemption claim. The case is extensively discussed in this brief, *supra.*

The cases relied upon by Allegheny in its Petition for a Writ of Certiorari are: *Capital Service, Inc. v. NLRB,* 347 U.S. 501, 98 L. Ed. 888 (1954); *Public Utilities Commission v. Gas Co.,* 317 U.S. 456, 87 L. Ed. 396 (1943); *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.,* 357 U.S. 77 (1958); *Chemical Specialties Manufacturers Assoc., Inc. v. Lowery,* 452 F.2d 431 (2d Cir. 1971). These cases did all hold "no abstention" in a given fact situation, but the instant case is distinguishable from these cases. The factors relied upon by Judge Rosenn were not present in these cases.

One of the principal factors relied upon by Judge Rosenn was the fact that Allegheny had on its own initiative sought and obtained from the Pennsylvania PUC ". . . a certificate of public convenience as an *intrastate* carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport." (465 F.2d at 243, Allegheny's Petition, App., p. 24a.) Judge Rosenn stated:

> Stripped of the efforts to drape this case with federal questions, the facts show that Allegheny, without any attempt on the part of the PUC to extend its regulatory powers over it, made a written application to the PUC for a certificate of public convenience as an intrastate carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport. The service it offered to provide was found by that Commission, after a hearing and an opportunity for affected parties to be heard, to be necessary to the public interest. A certificate of public convenience was granted and it is now held by Allegheny. Under the rules of the Commission, all or part of this service may be discontinued upon application by the carrier to the PUC and that agency's approval. Additionally, matters such as this which go to the jurisdiction of the PUC may be tested in special proceedings before the Pennsylvania Commonwealth Court. 66 P.S. 1441. The thrust of these Pennsylvania rules and laws is that, once certified, a carrier must test these issues before service is discontinued. (465 F.2d at 243, Allegheny's Petition, App., p. 24a.)

Clearly, a case such as the instant case, where the airline has sought and obtained a certificate of public convenience

is distinguishable from cases where no such certificate was sought and obtained.

Additional factors relied upon by Judge Rosenn as requiring abstention were:

(1) The State's interests in local airline service are significant. Airports, runways, and related facilities often require large expenditures at considerable community sacrifice and effort. In addition, the communities involved may have come to depend on the direct air service, and there is a presumption under Pennsylvania law that certificated public utility service is needed and vital, until a public utility proves otherwise (465 F.2d at 244, Allegheny's Petition, App., p. 25a).

(2) Allegheny presented no evidence suggesting that it would have been harmed by having to resort to the Pennsylvania PUC or State courts before discontinuing the service (*Id.*).

(3) Reliance by local communities upon the services provided by Allegheny would be reasonable in light of the airline's action in obtaining from the Pennsylvania PUC a certificate to transport persons and property between points in Pennsylvania (465 F.2d at 244, 245, Allegheny's Petition, App., p. 26a).

(4) The danger of Federal-State friction is intensified by Allegheny's request for a perpetual injunction which would enjoin the Pennsylvania PUC from "*any action or proceeding* for any violation of the laws of . . . Pennsylvania based upon action by Allegheny in changing its patterns of service." If this relief were granted, the airline, while not being subject to State regulation, would maintain the benefits that accrue to holders of State public

utility certificates (465 F.2d at 245, Allegheny's Petition, App., p. 27a).

(5) There are no "... significant federal concerns which would override the other factors mentioned above. Even if it should be ultimately determined that the state does not have power to regulate the actions which precipitated this suit, a temporary co-existence of federal-state regulation will not frustrate any immediate goals or policies of the Federal Aviation Act." (465 F.2d at 245, Allegheny's Petition, App., p. 28a.)

In addition to the factors relied upon by this Court there is another factor supporting equitable abstention. This factor is that the State law is unsettled in this case, and a determination by State courts may make a determination on the Federal preemption issue unnecessary. The NARUC is aware that the Court of Appeals in the instant case stated:

> In what was basically an alternative abstention holding, the district court noted that "the dispute involves an unsettled question of state law, i.e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier." *Allegheny Airlines, Inc. v. PUC*, 319 F. Supp. 407, 413 (E.D. Pa. 1970). Since we find that the district court was correct in abstaining for the primary reasons it developed, *we find it unnecessary to decide* whether it correctly concluded there existed unclear state law. We *note*, however, that in our view, the PUC's authority to take the measures described above *seems* clear. 66 P.S. Sec. 1122. (465 F.2d at 242, n. 3, Allegheny's Petition, pp. 21a & 22a, n. 3). (Emphasis supplied.)

The NARUC asserts that the State law is unsettled. The Statute, 66 Pa. Code, Sec. 1122(b) provides:

> Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:
>
> * * *
>
> (b) For any public utility to abandon or surrender, in whole or in part, any service: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron.

The Pennsylvania courts have never passed upon the construction of this Statute as it relates to intrastate air transportation. As was stated by the District Court:

> Second, the dispute involves an unsettled question of state law, i.e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier. The parties have cited no Pennsylvania authorities defining the limits of the PUC's authority over rights granted to such carriers. Until the state courts speak to the question we cannot know whether they will interpret the PUC's authority under the state act narrowly or broadly. In making their determination as to the scope of the PUC's authority, the state courts are bound, just as the federal courts are, to interpret and apply the federal Constitution

> and laws and all of the arguments which Allegheny has sought to raise here under the interstate commerce and supremacy clauses of the federal Constitution must be given full consideration by the state courts. . . . (319 F. Supp. at 413, Allegheny's Petition, App. pp. 10a & 11a).

Certainly, the Pennsylvania courts should be permitted to interpret the statute prior to a Federal court's ruling on the preemption question. This was made clear by this Court in *Lake Carriers' Assn. v. MacMullen, supra,* 32 L. Ed. 2d at 270, 40 U.S. Law Week at 4573, as follows:

> We do not know, of course, how far Michigan courts will go in interpreting the requirements of the state Watercraft Pollution Control Act in light of the federal Water Quality Improvement Act and the constraints of the United States Constitution. But we are satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly modify the federal questions appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations that we have found compelling in prior decisions. See, *e.g., Harman v. Forssenius, supra,* at 537, 14 L. Ed. 2d at 56; *Baggett v. Bullitt,* 377 U.S. 360, 378-379, 12 L. Ed. 2d 377, 389, 84 S. Ct. 1316 (1964).

Accordingly, the United States Court of Appeals properly affirmed, on the grounds of equitable abstention, the Federal District Court's dismissal of Allegheny's suit.

II.

THE FEDERAL AVIATION ACT OF 1958 DOES NOT PREVENT PENNSYLVANIA FROM ADMINISTERING A REASONABLE REGULATORY PROGRAM TO PROTECT THE PUBLIC INTEREST OF TRAVELERS USING INTRASTATE AIR TRANSPORTATION.

Allegheny asserts that, "For the purpose of judging the propriety of abstention in this case, it must be assumed that Congress intended to preempt state regulation of scheduling by a federally certificated air carrier." (Allegheny's Petition, p. 6.) No authority is cited for this assertion and there is no authority for this assertion. Clearly no such assumption can be made in the present case.

In addition, Allegheny asserts that ". . . there is a direct conflict in federal and state regulatory authority." (Allegheny's Petition, p. 10.) This assertion is contrary to the findings of the Court of Appeals (465 F.2d at 245, Allegheny's Petition, App., pp. 27a and 28a) and is not supported by the facts of this case.

Congress, in enacting the Federal Aviation Act of 1958 (49 U.S.C.A., Sec. 1301 *et seq.*), clearly did not intend to completely preempt the regulation of air transportation. CAB domestic jurisdiction in the economic sense is primarily couched in terms of "interstate air commerce" and "interstate air transportation."[1] Moreover, the CAB is

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[1]49 U.S.C.A., Sec. 1301 (20), defining "interstate air commerce," and 49 U.S.C.A., Sec. 1301 (21), defining "interstate air transportation," tie the definitions to the crossing of a State line. The definitions of "air transportation" [Sec. 1301(10)] and of "air commerce [Sec. 1301(4)] are both tied to interstate movement and the transportation of mail, and the latter goes further to include operations "within the limits of any Federal airway" or "which directly

(Continued)

expressly "empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this act within its jurisdiction. . . ." 49 U.S.C.A., Sec. 1324(b)

Obviously, this is not the language of total Federal preemption.

The Congressional propensity to divide the interstate and intrastate characteristics of a national industry, and to assign the former to Federal regulation and to reserve the latter for State regulation, is consistently reflected in many other areas. More specifically, this regulatory dichotomy is applied to electric companies under the Federal Power Act,[2] to gas companies under the Natural Gas Act,[3] to railroads and motor carriers under the Interstate Commerce

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[1](Cont'd) affects, or which may endanger safety in, interstate... commerce." These definitions assume jurisdictional significance in Sections 1302, 1371, 1373 and 1374 of 49 U.S.C.A., which concern matters of "public interest," certificates of public convenience and necessity, tariffs, and rates, respectively.

[2]16 U.S.C.A., Sec. 791, *et seq.*, with particular reference to Secs. 824(b)(c), 824a(f), 824c(f), and 824h. In general, the Federal Power Commission regulates wholesale rates and related facilities and service, and the State commissions regulate retail rates and related facilities and service.

[3]15 U.S.C.A., Sec. 717, *et seq.*, with particular reference to Secs. 717(b)(c), 717a(6,7), and 717p. In general, the Federal Power Commission regulates "interstate" wholesale rates and related facilities and service, and the State commissions regulate "intrastate" wholesale and all retail rates and related facilities and service. See also Secs. 3, 4 and 5 of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C.A., Secs. 1672-1674) which apply an analogous regulatory split to the national gas safety program.

Act,[4] and to telephone and telegraph companies under the Communications Act.[5]

The Federal Aviation Act is the latest offspring in this family of legislation and bears unmistakably the genetic qualities of Federal-State regulatory alliance.

Legislative intent is further reflected by the failure of Congress to enact bills proposing to extend Federal economic regulation to include intrastate operations of air carriers.[6]

We believe Congress was wise in permitting the formation of this Federal-State alliance because its proper functioning affords the American people the maximum benefits

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[4]49 U.S.C.A., Sec. 1, *et seq.*, with particular reference to Secs. 1(2), 1(17)(a), 1(22), 13(2)(3), 13a(2), 302(a)(b), 303(10)(20), and 305. In general, the State commissions regulate the intrastate business of railroads and motor carriers. See also Secs. 205 and 206 of the Federal Railroad Safety Act of 1970 (Public Law 91-458) which permits a State: to adopt more stringent safety regulations than the Federal safety regulations "when necessary to eliminate or reduce an essentially local safety hazard" created by interstate railroad operations; and to otherwise conduct a comprehensive safety program covering substantially all interstate railroad operations within the State.

[5]47 U.S.C.A., Sec. 151 *et seq.*, with particular reference to Secs. 152, 153(e)(h), 214(a)(1-3), 221(b) and 410. The Federal Communications Commission regulates interstate message toll calls and local exchange calls even in instances where the boundaries of the exchange area overlap State lines.

[6]78th Congress, S. 246, H.R. 1012, H.R. 3420, H.R. 4845, H.R. 4848; 79th Congress, S. 541, H.R. 674, H.R. 3383; 80th Congress, H.R. 2337; 81st Congress, S. 423, S. 445, S. 2435. See also: 1944 NARUC Annual Convention Proceedings 221; 1945 *id.* 299; 1946 *id.* 210; 1947 *id.* 128; 1948 *id.* 69; 1949 *id.* 166; 1950 *id.* 106.

from air transportation. Obviously, a State agency, such as the Pennsylvania PUC, is far more concerned with the adequacy of air transportation among the smaller communities in the State than is the CAB. In contrast, the CAB is far more concerned with the adequacy of a national air transportation system than is any one State. In short, the two regulatory interests form a partnership complementing each other in advancing the public welfare.

Out of interpretations of the above Federal statutes, and out of other incidents of our Federalism, has evolved a line of decisions defining the interface between Federal and State jurisdiction.

In *California v. Thompson*, 313 U.S. 109, 85 L. Ed. 1219 (1941), this Court held that a State license statute regulating transportation agents engaged in negotiating for the transportation of passengers in motor vehicles is not, as applied to interstate passengers, a violation of the Commerce Clause where the Congress has not, either in the Federal Motor Carrier Act or otherwise, undertaken to exercise its power of regulation over such interstate activities.

A unanimous Court, speaking through Justice Harlan Fiske Stone, outlined the broad limits of permissible State action under the Commerce Clause in the following terms (313 U.S. 113, 2d par., 85 L. Ed. 2d 1221 (2)):

> As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet

(US) 245, 7 L. Ed. 412, and *Cooley v. Port Wardens,* 12 How (US) 299, 13 L. Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope of local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Not withstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo v. Pennsylvania, supra* (273 U.S. 40, 71 L. Ed. 528, 47 S. Ct. 267).

A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith v. Alabama,* 124 U.S. 465, 31 L. Ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co. v. Alabama,* 128 U.S. 96, 32 L. Ed. 352, 9 S. Ct. 28, 2 Inters. Com. Rep. 238. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co. v. Arkansas,* 219 U.S. 453, 55 L. Ed. 290, 31 S. Ct. 275; *Missouri P. R. Co. v. Norwood,* 283 U.S. 249, 75 L. Ed. 1010, 51 S. Ct. 458, 30 NCCA 639, and prescribe regulations

for payment of their wages. *Erie R. Co. v. Williams,* 233 U.S. 685, 58 L. Ed. 1155, 34 S. Ct. 761, 51 LRA (NS) 1097. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. & H. R. Co. v. New York,* 165 U.S. 628, 41 L. Ed. 853, 16 S. Ct. 418. It may limit the speed of interstate trains within city limits. *Erb v. Morasch,* 177 U.S. 584, 44 L. Ed. 897, 20 S. Ct. 819. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co. v. Public Utility Comrs.,* 254 U.S. 394, 409, 412, 65 L. Ed. 322, 333, 334, 41 S. Ct. 169, PUR1921C 143. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans L. & T. R. & S. S. Co. v. Louisiana,* 118 U.S. 455, 30 L. Ed. 237, 6 S. Ct. 1114; *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health,* 186 U.S. 380, 46 L. Ed. 1209, 22 S. Ct. 811. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson v. Black Bird Creek Marsh Co.,* 2 Pet. (U.S.) 245, 7 L. Ed. 412, *supra;* see *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 267, 80 L. Ed. 215, 219, 56 S. Ct. 194. It may regulate pilots and pilotage in its harbors. *Cooley v. Port Wardens,* 12 How. (U.S.) 299, 13 L. Ed. 996, *supra.* Where, as here, Congress has not entered the field, a state may pass inspection laws and regulations applicable to articles of interstate commerce designed to safeguard the

inhabitants of the state from fraud, provided only that the regulation neither discriminates against nor substantially obstructs the commerce. *Turner v. Maryland,* 107 U.S. 38, 27 L. Ed. 370, 2 S. Ct. 44; *Plumley v. Massachusetts,* 155 U.S. 461, 39 L. Ed. 223, 15 S. Ct. 154, 5 Inters. Com. Rep. 590; *Patapsco Guano Co. v. Board of Agriculture,* 171 U.S. 345, 357, 358, 43 L. Ed. 191, 195-6, 18 S. Ct. 862; *Savage v. Jones,* 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715; see also *Minnesota Rate Cases (Simpson v. Shepard),* 230 U.S. 352, 398, 412, 57 L. Ed. 1511, 1540, 1547, 33 S. Ct. 729, 48 LRA (NS) 1151, Ann. Cas. 1916A 18, and cases cited; *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 185, 191, 82 L. Ed. 734, 738, 742, 58 S. Ct. 510, and cases cited. . . .

. . . It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the states to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and convenient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce. *Continental Baking Co. v. Woodring,* 286 U.S. 352, 371, 76 L. Ed. 1155, 1166, 52 S. Ct. 595, 81 ALR 1402; *Bradley v. Public Utilities Commission,* 289 U.S. 92, 95, 77 L. Ed. 1053, 1056, 53 S. Ct. 577, 85 ALR 1131; see *South Carolina State Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510, *supra,* and cases cited; *H. P. Welch Co. v. New Hampshire,* 306 U.S. 79, 83,

83 L. Ed. 500, 504, 59 S. Ct. 438; *Eichholz v. Public Serv. Commission*, 306 U.S. 268, 83 L. Ed. 641, 59 S. Ct. 532; *Maurer v. Hamilton*, 309 U.S. 598, 603, 84 L. Ed. 969, 974, 60 S. Ct. 726; and see *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 84 L. Ed. 128, 60 S. Ct. 163.

If there is authority in the state, in the exercise of its police power, to adopt such regulations affecting interstate transportation, it must be deemed to possess the power to regulate the negotiations for such transportation where they affect matters of local concern which are in other respects within state regulatory power, and where the regulation does not infringe the national interest in maintaining the free flow of commerce and in preserving uniformity in the regulation of the commerce in matters of national concern. See *Hartford Acci. & Indem. Co. v. Illinois*, 298 U.S. 155, 80 L. Ed. 1099, 56 S. Ct. 685.

This Court held in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190, that neither the Natural Gas Act, nor the Commerce Clause of its own force, precluded State regulation of rates for natural gas sold by an interstate pipeline to local consumers. See also: *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 64 L. Ed. 434, 40 S. Ct. 279 (1920).

In *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U.S. 179, 95 L. Ed. 190 (1950), which upheld an order of the Oklahoma State Corporation Commission fixing the minimum well-head price on gas entering interstate commerce, a unanimous Court observed that:

The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley v. Port Wardens* (U.S.) 12 How. 299, 13 L. Ed. 996 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker v. Brown,* 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346, 83 L. Ed. 752, 59 S. Ct. 528 (1939); *South Carolina Highway Dept. v. Barnwell Bros.,* 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510 (1938). The only requirements consistently recognized have been that the regulation does not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept. v. Barnwell Bros.,* (U.S.), *supra.* Compare *Leisy v. Hardin,* 135 U.S. 100, 34 L. Ed. 128 (1890), decided prior to the Wilson Act (Aug. 8, 1890) 26 Stat. 313, ch. 728, with *Re Rahrer (Wilkerson v. Rahrer),* 140 U.S. 545, 35 L. Ed. 572, 11 S. Ct. 865 (1891), decided thereafter.

One of the leading cases in the field is *Head v. New Mexico Board of Examiners in Optometry* (1963) 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759. This case involved a New Mexico statute which prohibits advertising by the quotation of prices or terms for the sale of eyeglasses. Acting under the statute, a trial court enjoined a newspaper and a radio station in Hobbs, New Mexico, serving an area much of which lies in Texas, from accepting, publishing or broadcasting a Texas optometrist's advertising which violated the New Mexico statute.

The New Mexico Supreme Court affirmed the lower court's order on the grounds that the injunction did not unlawfully burden interstate commerce and that the State's jurisdiction has not been ousted by Federal legislation. 70 NM 90, 370 P2d 811.

On appeal, this Court affirmed. In an opinion by Justice Stewart, expressing the views of himself, Chief Justice Warren and Justices Black, Clark, Harlan, White and Goldberg, it was held that (1) the statutory prohibition of eyeglass price advertising does not impose a constitutionally prohibited burden on interstate commerce, (2) the FCC's jurisdiction to regulate radio advertising does not preempt New Mexico's authority to prescribe eyeglass price advertising by radio, and (3) the New Mexico statute does not violate the due process or privileges and immunities clauses of the Fourteenth Amendment.

Justice Brennan wrote a concurring opinion reaching the same conclusion as the majority. Justice Douglas concurred in the result.

The radio station contended that the New Mexico statute constituted an undue burden on interstate commerce and that the regulation of advertising by radio has been

preempted by the Communications Act of 1934. The majority opinion responded to these contentions by stating that (374 U.S. 427, 10 L. Ed. 2d 987):

I

Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce. As we said in *Huron Portland Cement v. Detroit*, 362 US 440, 4 L. Ed. 2d 852, 80 S. Ct. 813, 78 ALR2d 1294, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: "In determining whether the State has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' *Sherlock v. Alling*, 93 U.S. 99, 103; *Austin v. Tennessee*, 179 U.S. 343; *Louisville & Nashville R. Co. v. Kentucky*, 183 U.S. 503; *The Minnesota Rate Cases*, 230 U.S. 352; *Boston & Maine R. Co. v. Armburg*, 285 U.S. 234; *Collins v. American Bus Lines, Inc.*, 350 U.S. 528." 362 U.S., at 443, 444.

Like the smoke abatement ordinance in the *Huron* case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of State legislation in this precise area has been expressly established. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461. A State law may not be struck down on the mere showing that its administration affects interstate commerce in some way. "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co v. Detroit, supra* (362 U.S. at 448).

It has not been suggested that the statute, applicable alike to "any person" within the State of New Mexico, discriminates against interstate commerce as such. Nor can we find that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation. The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any. *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*, 372 U.S. 714, 10 L. Ed. 2d 84, 83 S. Ct. 1022. We hold that the New Mexico statutes as applied here to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce.

II

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of Federal regulation under the Federal Communications Act. "The 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case.' Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 336 U.S. 725, 93 L. Ed. 1005, 1010, 69 S. Ct. 841. *Kelly v. Washington*, 302 U.S. 1, 10-13, 82 L. Ed. 3, 10, 12, 58 S. Ct. 87. In areas of the law not inherently requiring national uniformity, out decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, (or) evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256, 83 S. Ct. 1210. . . .

Finally, there has been no showing of any conflict between this State law and the Federal regulatory system, or that the State law stands as an obstacle to the full effectiveness of the Federal

> statute. No specific Federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed State regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it. As in *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*, 372 U.S. 714, at 724, 10 L. Ed. 2d 84, 91, 83 S. Ct. 1022, we are satisfied that the State statute "at least so long as any power the (Commission) may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the Federal legislation."

The test of whether both Federal and State regulations may operate or the State regulation must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives. Federal regulation of a field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons, either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all State regulation at the other end. *Florida Lime and Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142, 2d par, 145, 10 L. Ed. 2d 248, 256, r. col., last par., 258, r. col, 83 S. Ct. 1210, reh. den. 374 U.S. 858, 10 L. Ed. 2d 1082, 83 S. Ct. 1861. See also: *The Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.* (1963) 372 U.S. 714, 10 L. Ed. 2d 84, 83 S. Ct. 1022; *Huron Portland Cement Company v. Detroit* (1960), 362 U.S. 440, 4 L. Ed. 2d 852,

80 S. Ct. 813; *Schwartz v. Texas* (1952), 344 U.S. 199, 97 L. Ed. 231, 73 S. Ct. 232; *Cities Service Gas Company v. Peerless Oil & Gas Co.* (1950), 340 U.S. 179, 95 L. Ed. 190, 71 S. Ct. 215; *California v. Zook* (1949), 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841, reh den. 337 U.S. 921, 93 L. Ed. 1729, 69 S. Ct. 1152; *Southern Pacific Company v. Arizona* (1945), 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515; *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820; *Maurer v. Hamilton* (1940), 309 U.S. 598, 84 L. Ed. 969, 60 S. Ct. 726, 135 ALR 1347; *H. P. Welch Company v. New Hampshire* (1939), 83 L. Ed. 500, 59 S. Ct. 438; *Kelly v. Washington* (1937), 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87; *Gilvary v. Cuyahoga Valley Railway Company* (1934), 292 U.S. 57, 78 L. Ed. 1123, 54 S. Ct. 573; *Mintz v. Baldwin* (1933), 289 U.S. 346, 77 L. Ed. 1245, 53 S. Ct. 611; *Atchison, Topeka, & Santa Fe Railway Company v. Railroad Commission of the State of California* (1931), 283 U.S. 380, 75 L. Ed. 1128, 51 S. Ct. 553; and *Sinnot v. Davenport* (1859), 22 How. (U.S.) 227, 16 L. Ed. 243.

An act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several States to enact regulations covering other aspects of the subject[7] or merely supplement the Federal legislation in respect to local conditions.[8] Congressional regulation of a business or

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[7] *Dickinson v. Stiles* (1918), 246 U.S. 631, 62 L. Ed. 908, 38 S. Ct. 415; *Savage v. Jones* (1912), 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715; *Re Squires*, 114 Vt. 285, 44 A 2d 133, 161 ALR 349.

[8] *Huron Portland Cement Company v. Detroit* (1960), 362 U.S. 440, 4 L. Ed. 2d 852, 80 S. Ct. 813, 79 ALR 2d 1294.

activity does not nullify State regulation of the same business or activity if the Federal act does not cover the same field or is consistent with the State legislation, or if Congress has seen fit to only partially regulate the subject, since Congress has undoubted power to define the distribution of power over interstate commerce. Compare *Buck v. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502, reh. den. 343 U.S. 932, 96 L. Ed. 1341, 72 S. Ct. 756; *Hartford Accident & Indemnity Company v. Illinois* (1936) 298 U.S. 155, 80 L. Ed. 1099, 56 S. Ct. 685; *Missouri Pacific Railroad Company v. Norwood* (1931), 283 U.S. 249, 75 L. Ed. 1010, 51 S. Ct. 458.

Where the subject matter upon which the power is to be exercised is local and limited in its nature or sphere of operations, the rule is well established that the several States may prescribe regulations until Congress intervenes.[9] This is clearly the case where the regulations which should govern may in many respects be different in different localities and for that reason better understood and more wisely established by the local authorities.[10]

When a dispute arises over whether a given transaction is within the scope of Federal or State regulatory authority, the problem should not be approached negatively, thus raising the possibility that a "no man's land" will be created. *FPC v. Transcontinental Gas Pipe Line Corp.* (1961), 365 U.S. 1, at p. 19, 5 L. Ed. 2d 377, at p. 390, 81 S. Ct. 435.

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[9]*Halter v. Nebraska* (1907) 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419, aff'g. 74 Neb. 757, 105 NW 298.

[10]*Morgan's Louisiana and Texas Railroad and Steamship Company v. Board of Health* (1886), 118 U.S. 455, 30 L. Ed. 237, 6 S. Ct. 1114.

In *People v. Western Air Lines, Inc.*, 42 Cal. 2d 261, 268 P. 2d 723 (1954), the court upheld the authority of the California Public Utilities Commission to regulate passenger rates for air coach service between Los Angeles and San Francisco. The court in construing the Civil Aeronautics Act of 1938, which is comparable to the Federal Aviation Act of 1958, held that "it seems clear that Congress has not sought to extend the economic regulation of the board (CAB) to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates." 268 P. 2d 736 (26). An appeal from this decision was dismissed by this Court "for the want of a substantial Federal question." 348 U.S. 859, 99 L. Ed. 677, 75 S. Ct. 87 (1954). See also *United Air Lines, Inc. v. Public Utilities Commission of the State of California*, 342 U.S. 908, 96 L. Ed. 679, 72 S. Ct. 304 (1952).

This Court has also upheld the power of the States to tax the instrumentalities of airlines used in interstate commerce. *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 98 L. Ed. 967, 74 S. Ct. 757 (1954); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 88 L. Ed. 1283, 64 S. Ct. 950, 153 ALR 245 (1944).

As the Nation grows in population, the role of the State commissions in protecting the public interest in the local aspects of air transportation grows in importance. Obviously, the State is far more concerned than the CAB in seeing that local communities receive adequate intrastate air transportation to the extent economically feasible.

We readily admit national supremacy in air transportation and that the State role must not interfere with the accomplishment of national objectives as determined by the Federal Aviation Act.

We admit that the final determination of public need for air service must ultimately rest in its use by the traveling public.

We admit that an airline should be authorized to eliminate certain cities as intermediate points on a route where the cost of serving such points would be too great in relation to the small volume of traffic.

We merely contend that State commissions should continue to be entrusted with the making of initial decisions regarding matters of intrastate air transportation. The nature of Allegheny's Federal certificate in this case, which permits great freedom in abandoning routes within Pennsylvania, indicates that the CAB is only secondarily interested in intrastate service. This is understandable when we consider its immense duties involving interstate service.

If State regulation is ousted, public protection will be diminished. In the absence of PUC regulation, Allegheny could easily decide to concentrate its equipment in serving the most remunerative segments and abandon other segments showing a lower margin of profit.

Moreover, a similar argument to avoid loss of profits—under the guise of the need for ubiquitous Federal regulation of air transportation—was recently made by CAB certificated interstate airlines, serving intrastate segments in Texas, in an effort to prevent competition from a Texas certificated airline over the same intrastate segments. The Texas Supreme Court affirmed the grant of the Texas certificate in *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W. 2d 199, and, on appeal, the United States Supreme Court denied review. 27 L. Ed. 2d 247, 91 S. Ct. 244 (Dec. 7, 1970).

CONCLUSION

For the foregoing reasons, the NARUC submits that Allegheny's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied since the decision is clearly in accord with prior precedents of this Court.

Respectfully submitted,

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